

Federal Acquisition Regulation

3.104-9

is received, or as soon thereafter as practicable, the agency ethics official shall issue an opinion as to whether proposed conduct is proper or would violate section 27 of the Act.

(i) Where complete information is not included in the request, the agency ethics official may ask the requester to provide any information reasonably available to that person, and the 30-day period will run from the date that additional information is received. Additional information may also be requested from other persons, including the Source Selection Authority, the contracting officer, or the requester's immediate supervisor.

(ii) Where the opinion cannot be issued within 30 days, the reason for the delay will be documented in the file. Acceptable reasons for delay include, but are not limited to, the necessity for the agency ethics official to independently develop information not reasonably available to the requester, or to verify questionably information furnished by the requester.

(iii) In issuing an opinion, the agency ethics official may rely upon the accuracy of information furnished by the requester or other agency sources, unless he has reason to believe that the information is fraudulent, misleading, or otherwise incorrect.

(4) A copy of the request and ethics advisory opinion shall be retained for a period of 6 years. Agencies shall not provide copies of the advisory opinions to any person other than the requester, except with the express authorization of the requester or where release is otherwise permitted by law.

(5) Where the requester engages in conduct in good faith reliance upon an ethics advisory opinion, or a competing contractor engages in conduct based upon good faith reliance on the requester's ethics advisory opinion, neither the requester nor the competing contractor shall be found to have knowingly violated the restriction in issue. Where the requester or the competing contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information provided by the requester, their reli-

ance upon the opinion will not be deemed to be in good faith.

[55 FR 36790, Sept. 6, 1990]

3.104-9 Certification requirements.

(a) *Applicability.* Subsection 27(e) of the Act requires certifications, prior to the award of a Federal agency contract or contract modification for property or services in excess of \$100,000 awarded or executed on or after December 1, 1990, by the officer or employee of the contractor responsible for the offer or bid for that particular contract or contract modification for property or services, and by the contracting officer for that procurement.

(b) *Competing contractor certification.* (1) Except as provided in 3.104-9(f), contracting officers shall require the competing contractor to—

(i) Certify in writing to the contracting officer responsible for the procurement that, to the best of his or her knowledge and belief, such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3) as implemented in the FAR; or

(ii) Disclose to such contracting officer any and all such information, and certify in writing to such contracting officer that any and all such information has been disclosed; and

(iii) Except in the case of a contract for the procurement of commercial items, certify in writing to such contracting officer that, to the best of his or her knowledge and belief, each officer, employee, agent, representative, and consultant of such competing contractor who, on or after December 1, 1990, has participated personally and substantially in the preparation or submission of such bid or offer, or in a modification of a contract, as the case may be, has certified in writing to such competing contractor that he or she—

(A) Is familiar with, and will comply with, the requirements of subsection 27(a) of the Act (see 3.104-3) as implemented in the FAR; and

(B) Will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification of a contract, as the case may be,

any information concerning a violation or possible violation of subsections 27 (a), (b), or (f) of the Act (see 3.104-3), occurring on or after December 1, 1990, as implemented in the FAR.

(2) Subcontractors are not required to submit the certificate required by subsection 27(e)(1) of the Act. However, nothing in 3.104 precludes a competing contractor from requesting certifications from its subcontractors.

(3) The signed certifications prescribed in 3.104-10 shall be submitted as follows:

(i) *Procurements exceeding \$100,000 using sealed bidding procedures:* (A) For procurements using sealed bidding procedures, the signed certifications shall be submitted by each bidder with the bid submission, except for procurements using two-step sealed bidding procedures (see subpart 14.5). For those procurements, the certifications shall be submitted with submission of the step two sealed bids. A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(B) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options (see 3.104-4(e)) exceeds \$100,000.

(C) Failure of a bidder to submit the signed certificate with its bid render the bid nonresponsive.

(ii) *Procurements exceeding \$100,000 using other than sealed bidding procedures:* (A) For procurements, including contract modifications, made using procedures other than sealed bidding, the signed certifications shall be submitted by the successful offeror to the contracting officer within the time period specified by the contracting officer when requesting the certificates, except as provided in subdivisions (b)(3)(ii) (B) through (F) of this subsection. In no event shall the certificate be submitted subsequent to award of a contract or execution of a contract modification.

(B) For letter contracts, other unpriced contracts, or unpriced contract modifications, whether or not the unpriced contract or modification con-

tains a maximum or not to exceed price, the signed certifications shall be submitted prior to the award of the letter contract, unpriced contract, or unpriced contract modification, and prior to the definitization of the letter contract or the establishment of the price of the unpriced contract or unpriced contract modification. The second certification shall apply only to the period between award of the letter contract and execution of the document definitizing the letter contract, or award of the unpriced contract or unpriced contract modification and execution of the document establishing the definitive price of such unpriced contract or unpriced contract modification.

(C) For basic ordering agreements—prior to the execution of a priced order; prior to the execution of an unpriced order, whether or not the unpriced order contains a maximum or not to exceed price; and prior to establishing the price of an unpriced order. The second certificate to be submitted for unpriced orders shall apply only to the period between award of the unpriced order and execution of the document establishing the definitive price for such order.

(D) A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(E) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options exceeds \$100,000.

(F) For purposes of contracts entered into under section 8(a) of the SBA, the business entity with whom the SBA contracts, and not the SBA, shall be required to comply with the certification requirements of subsection 27(e). The SBA shall obtain the signed certificate from the business entity, and forward the certificate to the contracting officer prior to the award of a contract to the SBA.

(G) Failure of an offeror to submit the signed certificate within the time prescribed by the contracting officer is

Federal Acquisition Regulation

3.104-9

a failure to comply with a material requirement of the solicitation and shall cause the offer to be rejected.

(c) *Contracting officer certifications.* (1) In accordance with subsection 27(e)(2) of the Act, a Federal agency may not award a contract for the procurement of property or services, or agree to a modification of any contract, if the contract or contract modification exceeds \$100,000, unless the contracting officer responsible for such procurement—

(i) Certifies in writing to the head of such agency that, to the best of his or her knowledge and belief, the contracting officer has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3), as implemented in the FAR, pertaining to such procurement; or

(ii) Discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

(2) Immediately prior to contract award or execution of a contract modification, the contracting officer shall execute the following certificate and maintain the completed certificate in the contract file:

CONTRACTING OFFICER CERTIFICATE OF PROCUREMENT INTEGRITY

1. I, [Name of contracting officer], hereby certify that, to the best of my knowledge and belief, with the exception of any information described in this certificate, I have no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of section 27 of the Office of Federal Procurement Policy Act* (41 U.S.C. 423), as implemented in the FAR, occurring during the conduct of this procurement (contract/modification number).

2. Violations or possible violations: (Continue on plain bond paper if necessary, and label Contracting Officer Certificate of Procurement Integrity (Continuation Sheet), ENTER "NONE" IF NONE EXISTS.)

(Signature of contracting officer and date)

*Subsections 27 (a), (b), and (d), are effective on December 1, 1990. Subsection 27(f) is effective on June 1, 1991. THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING

OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001.

(End of certification)

(d) *Additional certifications.* (1) Subsection 27(e)(3) of the Act provides that the head of a Federal agency may require any procurement official or any competing contractor, at any time during the conduct of any Federal agency procurement of property or services—

(i) To certify in writing that, to the best of his or her knowledge and belief, such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for a contract or the modification of a contract, has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), and (f) of the Act (see 3.104-3), as implemented in the FAR, occurring during the procurement; or

(ii) To disclose any and all such information and to certify in writing that any and all such information has been disclosed.

(2) In addition to the Head of the Agency, additional certifications may be required only by the HCA or his or her designee, provided that the designee is an individual of General Officer, Flag, SES or equivalent rank and is at least one organizational level above the contracting officer.

(3) Any additional certifications shall be submitted to the contracting officer unless another person is specified by the individual requiring the additional certifications.

(4) Each procurement official or competing contractor shall be afforded a reasonable time to comply with the additional certification requirements.

(5) A competing contractor's failure to submit any additional certifications that may be required shall cause the competing contractor's offer to be rejected.

(e) *Recordkeeping requirements.* (1) In accordance with subsections 27(e)(5) (A) and (B) and 27(e)(7)(A) of the Act, the contracting officer responsible for the award or modification of a contract in excess of \$100,000 shall maintain, as part of the contract file—

(i) All competing contractor, contracting officer, and procurement official certifications required by subsections 27 (e)(1), (e)(2), and (e)(4) of the Act, and any additional certifications required by subsection 27(e)(3) of the Act for that particular procurement.

(ii) All certifications required by subsection 27(l) of the Act (see 3.104-12) from individuals acting as procurement officials on behalf of the procuring agency, who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors (other than competing contractors).

(iii) A record of all persons who have been authorized by the Head of the Agency or the contracting officer to have access to proprietary or source selection information regarding the procurement. When classes of persons have been authorized, this record shall identify the class of persons so authorized and, to the maximum extent practicable, the names of the individuals within the class.

(2) Certifications obtained from Government officers or employees (see 3.104-4(d)) who are required to submit a certification under subsection 27(l) of the Act shall be maintained in accordance with agency procedures.

(3) Ethics advisory opinions shall be retained, in accordance with agency procedures, for a period of 6 years.

(f) *Exceptions to certification requirements.* Pursuant to subsection 27(e)(7)(B) of the Act, certification requirements set forth in 3.104-9 do not apply—

(1) To contracts with a foreign government or an international organization that are not required to be awarded using competitive procedures pursuant to section 303(c)(4) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(4)), or section 2304(c)(4) of title 10 U.S.C.; or

(2) In an exceptional case, when the Head of the Agency concerned determines in writing that the certification requirement should be waived. This authority may not be delegated. The contracting officer shall submit the request for waiver in accordance with agency procedures. The request shall clearly identify the procurement or class of procurements and provide the rationale for the requested waiver. The

decision of the agency head shall state the reasons for approving or disapproving the waiver. The agency head shall promptly notify Congress in writing of each waiver approved. Procurements for which a waiver may be appropriate include—

(i) Where prices are set by law or regulation;

(ii) Where terms and conditions of a contract are specified by an agreement with a foreign government or governments;

(iii) Where supplies or services are provided by foreign nationals to United States facilities overseas for use outside the United States;

(iv) Where a foreign government specifies a particular U.S. contractor to satisfy its requirements (see 6.302-4(b)(1)).

[55 FR 36792, Sept. 6, 1990, as amended at 55 FR 49854, Nov. 30, 1990; 59 FR 11387, Mar. 10, 1994; 60 FR 37774, July 21, 1995]

3.104-10 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the provision at 52.203-8, Requirement for Certificate of Procurement Integrity, in all solicitations where the resultant contract award is expected to exceed \$100,000, unless, pursuant to 3.104-9(f), a certification is not required or a waiver has been granted. For procurements using other than sealed bidding procedures, the contracting officer shall substitute Alternate I for paragraph (c) of that provision.

(b) The contracting officer shall insert the clause at 52.203-9, Requirement for Certificate of Procurement Integrity-Modification, in all solicitations where the resultant contract award is expected to exceed \$100,000, all contracts in excess of \$100,000, and modifications to contracts which do not already contain the clause when the modification is expected to exceed \$100,000, unless, pursuant to 3.104-9(f), a certificate is not required or a waiver has been granted.

(c) The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal for Improper Activity, in all solicitations where the resultant contract award is expected to exceed the simplified acquisition threshold and all contracts